Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–01 OF 2007
ABDUL HAMID MOHAMAD, NIK HASHIM AND AZMEL FCJJ
14 SEPTEMBER 2007

Limitation — Public Authorities Protection Act — Whether action time barred — Limitation period of 36 months — Whether s 2(a) of the Public Authorities Protection Act mandatory in terms — Whether time began to run from the date of the detention order or from the date the decision of the Board is communicated to the appellant — Whether limitation period can be abridged — Public Authorities Protection Act 1948 s 2(a) — Courts of Judicature Act 1964 s 25(2) & para 8 of the Schedule

Preventive Detention — Detention order — Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Appellant suspended and subsequently dismissed from service as a result of detention order — Appellant challenged validity of detention order through a dismissal action — Whether a detention order can be challenged in a collateral proceeding — Whether challenge time barred — Federal Constitution art 135(2)(d) — Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 general orders 34 & 35

The appellant was suspended from his duties as a driver of the Attorney General's Chambers with effect from 5 August 1991 on the ground that he had been detained under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the detention order'). The suspension was made pursuant to general order 34(2) of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 ('the GO 1980'). By a letter dated 16 July 1992, the appellant was dismissed from service with effect from 6 July 1992. The appellant by a letter dated 26 July 1992 appealed against the order of dismissal to the Lembaga Rayuan ('the Board'). On 19 October 1992, the Board made a decision dismissing the appeal and this decision was conveyed to the appellant vide a letter dated 26 November 1992. On 24 November 1995, the appellant filed an action against the first respondent and the second respondent, the Government of Malaysia, to seek a declaration that his dismissal was null and void and of no effect on the ground that it was based on an invalid detention order. The High Court dismissed the appellant's action. The appellant's appeal to the Court of Appeal was also dismissed. The Federal Court granted leave to appeal on the following questions: (1) whether the detention order could be challenged in a collateral proceeding; and (2) on the limitation period whether time began to run from the date of the detention order or from the date the decision of the Board was communicated to the appellant.

Held, dismissing the appeal:

(1) The validity of a detention order cannot be attacked in a collateral proceeding when written law precludes such an attack: *Boddington v British Transport Police* [1998] 2 WLR 639 and *McGuire v Hastings District Council* [2002] 2 NZLR 577 applied. The written laws that precluded a collateral attack of the detention order were art 135(2)(d) of the Federal Constitution ('FC') and general orders 34 and 35 of the GO 1980. Article 135(2)(d) of the FC took away the right of the appellant to be heard in the disciplinary proceedings taken against him solely on the existence of the detention order. Whereas general orders 34 and 35 provided that the disciplinary authority of such proceedings was to decide on the appropriate punishment as provided for under general order 36(i) of the GO 1980 upon the factual existence of the detention order. Therefore, the legal power of the disciplinary authority allowed it to make a valid order to dismiss the appellant from service notwithstanding that the validity of the detention order was in question. The appellant had failed to show that general orders 34 and 35 were not complied with. The procedure was strictly followed and there was no flaw in the decision making process of the disciplinary authority (see paras 8, 11–12, 16).

(2) The appellant could not challenge the validity of the detention order through the dismissal action that he brought. This was because, firstly, the action was not framed as an action to challenge the validity of the detention order, there being no prayer for a declaration that the detention order was null and void and the Deputy Minister of Home Affairs was not being made a party to the proceedings. Secondly, challenging the validity of the detention order was an abuse of the court's process because the appellant had failed to do so within the 36 months allowed by s 2(a) of the Public Authorities Protection Act 1948 ('the Act') to attack the detention order which was made on 5 August 1991 and the time for the challenge expired on 4 August 1994 while the writ was only filed on 24 November 1995, a delay of more than 15 months after the expiry of the limitation period. This was a clear case to which the doctrine of collateral challenge did not apply (see para 13–14).

(3) Section 2(a) of the Act is mandatory in its terms. The word 'shall' is used twice in that section indicating that the 36 months period in respect of time is a mandatory requirement and it cannot be abridged. Time starts to run from the act complained of and not the communication of the decision. The 'act' in the present case was the decision of the Board dismissing the appellant's appeal. This decision was made on 19 October 1992 as stated in the letter dated 26 November 1992. Hence, the time to file the action ran from the date of the decision and the last day to file it would be on 18 October 1995 and not on 25 November 1995. If time were to run from the date of communication of the decision on 26 November 1992 and not the date when the decision was made on 19 October 1992, then the provision in s 2(a) of the Act would have said so in the section. But there was no such provision. The appellant's action was time barred as he was 39 days late when he filed the action (see paras 20–21).

(4) Section 2(a) of the Act overrides para 8 of the Schedule to the Courts of Judicature Act 1964 ('the CJA), which provides for enlargement or abridgment of time for doing any act, when limitation is explicitly provided, for s 2(a) of the Act is a specific provision with no power to enlarge or abridge time. To hold otherwise would be in direct conflict with s 25(2) of the CJA and therefore not in accordance with written law (see para 22); *Datuk Bandar Kuala Lumpur v Kuala Lumpur Golf and Country Club Bhd* [2005] 3 CLJ 901; [2007] 3 MLJ 293 followed.

Per curiam:

The refusal of the Court of Appeal in *Md Aris bin Zainal Abidin v Suruhanjaya Pasukan Polis & Anor* [2002] 4 MLJ 105, to follow the decision of the Federal Court in *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower* [1983] 2 MLJ 54 was unjustified and in breach of the doctrine of stare decisis for not following loyally the decision of the higher court on the same matter. As *Mersing Omnibus* was the judgment of the Federal Court, the Court of Appeal was bound to follow it whether the Court of Appeal agreed with it or not. As the law then stood, the Federal Court held that *Mersing Omnibus*, is still good law with regard to the interpretation of the 'date of the proceeding' under the then O 53 r 1A of the Rules of the High Court 1980 ('the RHC') to mean the date of the decision of the Minister and not the date the decision was communicated as held in *Md Aris*. In construing a statute or for that matter the RHC the duty of the court was limited to interpreting the words used by the legislature or RHC and to give effect to the words used by it. In *Md Aris* however, the Court of Appeal read words which were not in O 53 r 1A of the RHC and this was a wrong thing to do and as such, the case should not be followed (see para 23).

[Bahasa Malaysia summary

Perayu telah digantung daripada tugasnya sebagai pemandu Jabatan Peguam Negara bermula dari 5 Ogos 1991 atas alasan beliau telah ditahan di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('perintah tahanan'). Penahanan tersebut dibuat menurut peraturan am 34(2) Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 ('PA 1980'). Melalui sepucuk surat bertarikh 16 Julai 1992, perayu telah dipecat daripada perkhidmatan yang mula berkuatkuasa dari 6 Julai 1992. Perayu melalui sepucuk surat bertarikh 26 Julai 1992 telah merayu terhadap perintah pemecatan itu kepada Lembaga Rayuan ('Lembaga'). Pada 19 Oktober 1992,, Lembaga telah membuat satu keputusan menolak rayuan itu dan keputusan ini disampaikan kepada perayu melalui sepucuk surat bertarikh 26 November 1992. Pada 24 November 1995, perayu telah memfailkan satu tindakan terhadap responden pertama dan responden kedua, Kerajaan Malaysia, dengan memohon satu deklarasi bahawa pemecatannya adalah terbatal dan tidak sah dan tidak berkuatkuasa atas alasan bahawa ia berdasarkan satu perintah penahanan yang tidak sah. Mahkamah Tinggi telah menolak tindakan perayu. Rayuan perayu ke Mahkamah Rayuan juga ditolak. Mahkamah Persekutuan memberikan kebenaran untuk merayu berdasarkan persoalan-persoalan berikut: (1) sama ada perintah penahanan boleh dicabar dalam prosiding kolateral; dan (2) berdasarkan tempoh had masa sama ada masa bermula dari tarikh perintah penahanan atau dari tarikh keputusan Lembaga telah dimaklumkan kepada perayu.

Diputuskan, menolak rayuan tersebut: A

(1) Kesahan satu perintah tahanan tidak oleh dicabar dalam satu prosiding kolateral jika undang-undang bertulis menghalang berbuat sedemikian: *Boddington v British Transport Police* [1998] 2 WLR 639 dan *McGuire v Hastings District Council* [2002] 2 NZLR 577 diterimapakai. Undang-undang bertulis yang menghalang perintah tahanan dicabar secara kolateral adalah perkara 135(2) Perlembagaan Persekutuan ('PP') dan peraturan am 34 dan 35 PA 1980. Perkara 135(2)(d) PP mengambil hak perayu untuk didengar dalam prosiding tatatertib terhadapnya semata-mata kerana terdapat perintah tahanan itu. Manakala peraturan am 34 dan 35 memperuntukkan bahawa pihak berkuasa tatatertib prosiding sedemikian perlu memutuskan hukuman yang sesuai seperti yang diperuntukkan di bawah peraturan am 36(i) PA 1980 berdasarkan terdapat berdasarkan fakta terdapatnya perintah tahanan. Oleh itu, kuasa sah pihak berkuasa tatatertib membenarkannya untuk membuat perintah yang sah untuk memecat perayu daripada perkhidmatan meskipun kesahan perintah kesahan perintah tahanan dipersoalkan. Perayu telah gagal menunjukkan bahawa peraturan am34 dan 35 tidak dipatuhi. Prosedur tersebut dipatuhi dengan ketat dan tiada kecacatan dalam proses membuat keputusan pihak berkuasa tatatertib (lihat perenggan 8, 11–12, 16). B C D

(2) Perayu tidak boleh mencabar kesahan perintah tahanan melalui tindakan pemecatan yang beliau mulakan. Ini adalah keran, pertamanya, tindakan itu tidak dibentuk sebagai satu tindakan untuk mencabar kesahan perintah tahanan, tiada permohonan untuk satu deklarasi bahawa perintah tahanan adalah batal dan tidak sah dan Timbalan Menteri Hal Ehwal Dalam Negeri tidak dijadikan pihak kepada prosiding. Keduanya, mencabar kesahan perintah tahanan merupakan penyalahgunaan proses mahkamah kerana perayu telah gagal untuk berbuat demikian dalam 36 bulan yang dibenarkan oleh s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('Akta') untuk mencabar perintah tahanan yang dibuat pada 5 Ogos 1991 dan masa untuk mencabar telah luput pada 4 Ogos 1994 walhal writ hanya difailkan pada 24 November 1995, satu kelewatan lebih 15 bulan selepas tamat tempoh had masa. Ini jelas satu kes di mana doktrin mencabar secara kolateral tidak terpakai (lihat perenggan 13–14). E F G

(3) Terma-terma kepada s 2(a) Akta adalah mandatori. Perkataan 'shall' digunakan dua kali dalam seksyen tersebut menandakan bahawa tempoh 36 bulan berkaitan masa adalah keperluan mandatori dan tidak boleh disingkatkan. Masa bermula dari tindakan yang diadukan dan bukan penyampaian keputusan. 'Act' dalam kes semasa adalah keputusan Lembaga menolak rayuan perayu. Keputusan ini dibuat pada 19 Oktober 1992 seperti dinyatakan dalam surat bertarikh 18 November 1995 dan bukan pada 25 November 1995. Jika ia bermula dari tarikh penyampaian keputusan pada 26 November 1992 dan bukan tarikh apabila keputusan dibuat pada 19 Oktober 1992, maka peruntukan s 2(a) Akta pasti telah menyatakan sedemikian dalam seksyen tersebut. Namun tiada peruntukan sebegini. Tindakan perayu telah luput masa kerana beliau lewat 39 hari apabila memfailkan tindakan tersebut (lihat perenggan 20–21). H I

(4) Seksyen 2(a) Akta mengatasi perenggan 8 dalam Jadual kepada Akta Mahkamah Kehakiman 1964 ('AMK'), yang memperuntukkan lanjutan atau singkatan masa untuk melaksanakan apa-apa tindakan, jika had masa dengan jelas memperuntukkan, kerana s 2(a) Akta adalah satu peruntukan spesifik tanpa kuasa untuk melanjut atau menyingkatkan masa. Untuk memutuskan sebaliknya merupakan konflik secara langsung dengan s 25(2) AMK dan oleh itu tidak menurut undang-undang bertulis (lihat perenggan 22); *Datuk Bandar Kuala Lumpur v Kuala Lumpur Golf and Country Club Bhd* [2005] 3 CLJ 901; [2007] 3 MLJ 293 diikut.

Per curiam:

Keengganan Mahkamah Rayun dalam *Md Aris bin Zainal Abidin v Suruhanjaya Pasukan Polis & Anor* [2002] 4 MLJ 105, untuk mengikut keputusan Mahkamah Persekutuan dalam *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower* [1983] 2 MLJ 54 tidak dijustifikasikan dan melanggar doktrin stare decisis kerana tidak mengikut keputusan mahkamah lebih tinggi berkaitan perkara sama. Oleh kerana *Mersing Omnibus* merupakan penghakiman Mahkamah Persekutuan, Mahkamah Rayuan terikat untuk mengikutnya sama ada Mahkamah Rayuan bersetuju atau tidak. Berdasarkan undang-undang pada masa itu, Mahkamah Persekutuan memutuskan bahawa *Mersing Omnibus* masih undang-undang baik berhubung penafsiran 'date of the proceeding' di bawah A 53 k 1A Kaedah-Kaedah Mahkamah Tinggi 1980 yang lama ('KMT') yang bermaksud tarikh keputusan Menteri dan bukan tarikh keputusan yang disampaikan seperti diputuskan dalam *Md Aris*. Dalam mentafsir suatu statut atau KMT tugas mahkamah terbatas kepada mentafsirkan perkataan-perkataan yang digunakan oleh badan perundangan atau KMT dan untuk memberi kesan kepada perkataan-perkataan yang digunakan. Dalam *Md Aris* bagaimanapun, Mahkamah Rayuan membaca perkataan-perkataan yang bukan dalam A 53 k 1A KMT dan ini suatu yang salah dan oleh demikian, kes tersebut tidak patut diikut (lihat perenggan 23).]

Notes

For cases on Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1367–1378.

For cases on whether action time barred, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2418–2420.

Cases referred to

Boddington v British Transport Police [1998] 2 WLR 639 (refd)

Co-operative Central Bank Ltd, The v Feyen Development Sdn Bhd [1997] 2 MLJ 829 (refd)

Datuk Bandar Kuala Lumpur v Kuala Lumpur Golf and Country Club Bhd [2005] 3 CLJ 901; [2007] 3 MLJ 293 (folld)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia [1994] 2 MLJ 114 (refd)

Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff [1997] 2 MLJ 271 (refd)

McGuire v Hastings District Council (2002) 2 NZLR 577 (refd)

Md Aris bin Zainal Abidin v Suruhanjaya Pasukan Polis & Anor [2002] 4 MLJ 105 (not folld)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower [1983] 2 MLJ 54 (refd)
Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113 (refd)
NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1987] 1 MLJ 39 (refd)
Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors [2005] 6 MLJ 120 (refd)
Twist v Randwick Municipal Council (1976) 136 CLR 106 (refd)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449 (refd)

Legislation referred to
Courts of Judicature Act 1964 ss 16, 25(2), para 8 of the Schedule
Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)
Federal Constitution arts 43A(2), 135(2)(d)
Legal Profession Act 1976 s 15(5)
Public Authorities Protection Act 1948 s 2(a)
Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 general orders 34(2), 35
Rules of the High Court 1980 O 53 r 1A
Town and Country Planning Act 1976 s 23(1)

Appeal from: Civil Appeal No W-01–27 of 1999 (Court of Appeal, Putrajaya)

Karpal Singh (Ramkarpal Singh with him) (Karpal Singh & Co) for the appellant.
Amarjeet a/l Serjit Singh (Senior Federal Counsel, Attorney General's Chambers) for the first and second respondents.

Nik Hashim FCJ (delivering judgment of the court):

[1] On 9 November 2006, this Court granted leave to appeal on the following questions:

(1) whether a detention order can be challenged in a collateral proceeding; and

(2) where a person has been dismissed pursuant to a detention order whether time begins to run from the date of the detention order or from the date the decision of the Lembaga Rayuan is communicated to the applicant.

[2] On 30 August 1991, the appellant, a driver with the Jabatan Peguam Negara, was suspended from his duties with effect from 5 August 1991 on the ground that he had been detained under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the PCO'). The suspension was pursuant to general order 34(2) of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 ('the GO 1980').

[3] By letter dated 16 July 1992, the appellant was dismissed from service with effect from 6 July 1992. The appellant by letter dated 26 July 1992 appealed against the order of dismissal to the Lembaga Rayuan ('the Board'). On 19 October 1992 the

Board made a decision dismissing the appeal and this decision was conveyed to the appellant vide a letter dated 26 November 1992.

[4] On 24 November 1995 the appellant filed an action against the first respondent and the second respondent, the Government of Malaysia, seeking a declaration that the dismissal was null and void and of no effect on the ground that it was based on an invalid detention order.

[5] The High Court dismissed the appellant's action. Appeal by the appellant was dismissed by the Court of Appeal. Hence the appeal before us. We heard the appeal on 31 July 2007. At the conclusion of the arguments of both sides, this court unanimously dismissed the appeal with costs and ordered that the deposit be paid to the respondents to account of their taxed costs.

[6] We now give our reasons.

FIRST QUESTION

[7] The appellant contended before us that the validity of the detention order upon which the appellant's dismissal was based could be challenged in a collateral proceeding in the nature of the civil suit filed by the appellant in the High Court. The detention was invalid as although a Deputy Minister of Home Affairs had the same power as a Minister of Home Affairs under art 43A(2) of the Federal Constitution, the Deputy Minister who signed the detention order, could not be said to know the state of mind of the Minister, who was said in the detention order to have been satisfied that the appellant ought to be detained. In short he himself could not be said to have applied his mind as to which limb of s 4(1) of the PCO he was acting under.

[8] With respect, we do not agree. We agree with the respondents that the validity of a detention order cannot be attacked in a collateral proceeding when written law precludes such an attack.

[9] In *Boddington v British Transport Police* [1998] 2 WLR 639 the House of Lords at p 651 said:

> … in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. *There are situations in which Parliament may legislate to preclude such challenges being made* …

[10] The *Boddington* case was referred to in *McGuire v Hastings District Council* (2002) 2 NZLR 577 where the Privy Council at p 590 reiterated that collateral challenges may be precluded by a statute:

> What counsel for the appellants have invoked are passages in the speeches to the effect that a collateral challenge to the validity of an administrative decision may be raised in civil

proceedings … These passages are qualified, however, by *recognition that a particular statutory context or scheme may exclude such collateral challenges*,*R v Wicks* [1998] AC 92 being an example in the planning field.

(Emphasis added.)

[11] In the present case the written laws that preclude a collateral attack of the detention order are art 135(2)(d) of the Federal Constitution and general orders 34 and 35 of the GO 1980 which are reproduced as follows:

Article 135(2)(d)

1 .....

2 No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

Provided that this clause shall not apply to the following cases:

(a) …

(b) …

(c) …

(d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration or protection of women and girls.

General Order 34

(1) Where there has been made against an officer an order of detention, supervision, restricted residence, banishment or deportation, or where there has been an order imposing upon such officer any form of restriction or supervision by bond or otherwise under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration or protection of women and girls, the Head of Department shall apply for a copy of the order from the appropriate authority and upon receipt thereof, shall submit a report together with full particulars of the officer's past record of service to the Appropriate Disciplinary Authority and the Head of Department shall recommend to the Disciplinary Authority whether the officer should be dismissed from the service, reduced in rank or otherwise dealt with depending on the degree of disrepute which the officer brings to the service.

(2) Upon receipt of the report from the Head of Department, the Appropriate Disciplinary Authority shall forthwith suspend the officer from the exercise of his duties.

General Order 35

(1) Notwithstanding anything in General Order 23, if after considering the report and documents submitted by the Head of Department in General Orders 33 and 34(1), the Appropriate Disciplinary Authority is of the opinion that the officer merits dismissal or reduction in rank, it may forthwith direct accordingly; or if it is of the opinion that the officer should be inflicted with a lesser punishment or otherwise

A dealt with, the Disciplinary Authority may forthwith inflict upon the officer such lesser punishment or deal with him in such manner as it may deem fit.

(2) If as a result of the lesser punishment the officer is not dismissed, the question of his emoluments during the period of his suspension shall be at the discretion of the Director General of Public Services.

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[12] Therefore, by its provision, art 135(2)(d) clearly takes away the right of the appellant to be heard in the disciplinary proceedings taken against him solely on the existence of the detention order. Whereas general orders 34 and 35 provide that the disciplinary authority of such proceedings is to decide on the appropriate C punishment as provided for under general order 36(i) of the GO 1980 upon the factual existence of the detention order. Thus, the legal power of the disciplinary authority allowed it to make a valid order to dismiss the appellant from the service notwithstanding that the validity of the detention order was in question.

D **[13]** It must also be pointed out that the appellant was making a collateral challenge by filing the writ and statement of claim to declare that his dismissal was null and void because the detention order used against him was not valid. We are of the view that the appellant could not challenge the validity of the detention order through the dismissal action that he brought. Firstly, the action was not framed as an E action to challenge the validity of the detention, there being no prayer for a declaration that the detention order was null and void and the Deputy Minister not being made a party.

[14] Secondly, challenging the validity of the detention order was an abuse of the court's process because the appellant had failed to do so within the 36 months F allowed by s 2(a) of the Public Authorities Protection Act 1948 ('the Act') to attack the detention order which was made on 5 August 1991 and the time for the challenge expired on 4 August 1994 while the writ was only filed on 24 November 1995, a delay of more than 15 months after the expiry of the limitation period. This is a clear case to which the doctrine of collateral challenge does not apply.

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[15] In dealing with the GO 1980 we must remind ourselves that we are dealing with general orders that have legislative effect and we must warn ourselves against adding words into them which were never intended (see *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia* [1994] 2 MLJ 114 (SC)). H General orders 34 and 35 which bind the disciplinary authority to accept the factual existence of the detention order in making the order of dismissal would similarly bind the High Court hearing any application challenging the validity of the detention order. In this regard, we find support in the passage of the judgment of Barwick CJ in *Twist v Randwick Municipal Council* (1976) 136 CLR 106 said at p 110:

I … if the legislation has made provision for that opportunity to [be heard] to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation,

decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.

[16] Thus, on the facts of the present case the appellant had failed to show that general orders 34 and 35 were not complied with. The procedure was strictly followed and in our judgment there was no flaw in the decision making process of the disciplinary authority. In the circumstances, the answer to the first question is in the negative.

SECOND QUESTION

[17] The second question relates to whether, when a person has been dismissed pursuant to a detention order, whether the time begins to run from the date the decision to dismiss is made or the date of the communication of the decision of the Board to the appellant. In the instant case, the detention order was dated 5 August 1991. The appellant was dismissed from the service vide letter dated 16 July 1992 with effect from 6 July 1992. The appellant by a letter dated 26 July 1992 appealed against the order of dismissal to the Board. On 19 October 1992 the Board made a decision dismissing the appeal. This decision was conveyed to the appellant vide a letter dated 26 November 1992. On 24 November 1995 the appellant filed the action against the first and second respondents.

[18] It was contended by the appellant that time for purposes of the limitation period under s 2(a) of the Act commences from the date when the decision was communicated by the Board to the appellant, ie on 26 November 1992; and since the action was filed on 24 November 1995, the appellant was therefore within the limitation period of 36 months to file the action and cited *Md Aris bin Zainal Abidin v Suruhanjaya Pasukan Polis & Anor* [2002] 4 MLJ 105 in support.

[19] Section 2(a) of the Act states:

> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions *shall* have effect:
>
> (a) the suit, *action*, prosecution or proceeding *shall not lie or be instituted unless it is commenced within thirty-six months next after the act*, neglect or default *complained of* or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;
>
> (Emphasis added.)

[20] In our judgment, s 2(a) of the Act is mandatory in its terms. The word 'shall' is used twice in that section indicating that the 36 months period in respect of time is a mandatory requirement and it cannot be abridged. It is therefore clear that time starts to run from the act complained of and not the communication of the decision as contended by the appellant. The 'act' in the present case is the decision of the Board dismissing the appellant's appeal. This decision was made on 19 October 1992

as stated in the letter dated 26 November 1992. Hence, the time to file the action runs from the date of the decision and the last day to file it would be on 18 October 1995 and not on 25 November 1995. If time were to run from the date of communication of the decision on 26 November 1992 as contended by the appellant and not the date when the decision was made on 19 October 1992, then the provision in s 2(a) of the Act would have said so in the section. But here there was no such provision. A good example of such provision is found in s 23(1) of the Town and Country Planning Act 1976 which states:

> 23. Appeal against decision of local planning authority
>
> (1) An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the Appeal Board within one month *from the date of the communication of such decision to him*, …
>
> (Emphasis added.)

[21] Therefore, we hold that the contention of the appellant was misconceived. Such being the case, we find that the appellant's action was time-barred as he was 39 days late when he filed the action.

[22] In *Datuk Bandar Kuala Lumpur v Kuala Lumpur Golf and Country Club Bhd* [2005] 3 CLJ 901; [2007] 3 MLJ 293, Abdul Hamid Mohamad FCJ (later PCA) delivering the judgment of the Federal Court, referred to the case of *Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff* [1997] 2 MLJ 271 where it held that the specific law (referring to the requirement of notices to be posted for three months under s 15(5) of the Legal Profession Act 1976) overrides the general law under para 8 of the Schedule to the Courts of Judicature Act 1964 ('the CJA'), which provides for enlargement or abridgment of time for doing any act, when limitation is explicitly provided for. Likewise, s 2(a) of the Act overrides para 8 of the Schedule to the CJA for s 2(a) of the Act is a specific provision with no power to enlarge or abridge time. And to hold otherwise would be in direct conflict with s 25(2) of the CJA and therefore not in accordance with written law.

[23] It is worthy of note that the purpose of s 2(a) of the Act is to give time period for any action brought against any person acting in execution of statutory or other public duty within 36 months after the act complained of. The 36 months period is incorporated into s 2(a) as a reasonable period of time for such action and it is not for the court to query legislation but merely to give effect to the will of Parliament as expressed in the law. It is in that spirit we say that the refusal of the Court of Appeal in *Md Aris* to follow the decision of the Federal Court in *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower* [1983] 2 MLJ 54 is unjustified and in breach of the doctrine of stare decisis for not following loyally the decision of the higher court on the same matter. As *Mersing Omnibus* was the judgment of the Federal Court, the Court of Appeal was bound to follow it whether the Court of Appeal agreed with it or not (see *Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; *The Co-operative Central Bank Ltd v Feyen Development Sdn Bhd* [1997] 2 MLJ 829; *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [2005] 6 MLJ 120 per Ahmad Fairuz JCA (later Chief Justice)). Indeed it is not for the Court of Appeal to question whether the procedure to require an applicant

for certiorari to move the court for leave within six weeks from the date of the decision is fair or not. It is a matter for the Rules Committee acting under s 16 of the CJA to decide. As the law then stood, we rule that *Mersing Omnibus* is still good law with regard to the interpretation of the 'date of the proceeding' under the then O 53 r 1A of the Rules of the High Court 1980 ('the RHC') to mean the date of the decision of the Minister and not the date the decision was communicated to the appellant as held in *Md Aris*. In construing a statute or for that matter the RHC the duty of the court is limited to interpreting the words used by the legislature or RHC and to give effect to the words used by it (see *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39; *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449). In *Md Aris*, however, the Court of Appeal read words which were not in O 53 r 1A of the RHC and this is a wrong thing to do and as such, the case should not be followed.

[24] Accordingly, our answer to the second question is that time runs from the date of the decision of the Board dismissing the appeal by the appellant on 19 October 1992 and not the date of communication of the order of dismissal to the appellant on 26 November 1992.

[25] My learned brothers, Abdul Hamid Mohamad FCJ (later PCA) and Azmel FCJ have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

Reported by Peter Ling